

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff

V.

JERMAINE SMITH,

Defendant

Case No.: 2:12-cr-00004-APG-GWF

## ORDER DENYING MOTION TO VACATE

[ECF No. 1608]

The defendant, Jermaine Smith, moves to modify his sentence, which I imposed in early 2015, pursuant to 28 U.S.C. §2255. As correctly noted by the government, the present motion is a successive §2255 motion for which Smith has not obtained an order from the court of appeals authorizing me to consider the motion. Accordingly, I will deny the motion.

## Background

On October 21, 2014, the defendant, Jermaine Smith, pleaded guilty to participating in a Racketeer Influenced Corrupt Organization in violation of 18 U.S.C. §1962(c) and 1963. I sentenced Smith on April 9, 2015, and signed the Judgment in a Criminal Case on April 22, 2015. Smith did not appeal his conviction.

On May 23, 2016, Smith filed his first §2255 motion by depositing it into the mail. I denied the motion as untimely, as it was filed more than a year after Smith's conviction became final. I also declined his request for a certificate of appealability. Smith did not appeal the denial of that motion. On August 9, 2018, Smith filed the motion now before me, his second §2255 motion.

1 **Discussion**

2 To bring a second or successive §2255 motion, a defendant first “shall move in the  
3 appropriate court of appeals for an order authorizing the district court to consider the  
4 application.” 28 U.S.C. §§2244, 2255(h). As Smith previously moved for §2255 relief, he must  
5 move for and obtain an order from the Ninth Circuit Court of Appeals authorizing me to consider  
6 his present motion. He has not done so. Accordingly, I cannot consider his present motion and  
7 must deny it as an unauthorized second or successive §2255 motion.

8 **Certificate of Appealability**

9 To appeal this order, Smith must receive a certificate of appealability.<sup>1</sup> To obtain that  
10 certificate, he “must make a substantial showing of the denial of a constitutional right, a  
11 demonstration that . . . includes showing that reasonable jurists could debate whether (or, for that  
12 matter, agree that) the petition should have been resolved in a different manner or that the issues  
13 presented were adequate to deserve encouragement to proceed further.”<sup>2</sup> This standard is  
14 “lenient.”<sup>3</sup>

15 I have denied Smith’s motion because it is a second or successive §2255 motion for  
16 which he has neither sought nor obtained an order from the Ninth Circuit authorizing me to  
17 consider his motion. I will thus deny Smith’s request for a certificate of appealability.

18 IT IS THEREFORE ORDERED that defendant Jermaine Smith’s motion under 28  
19 U.S.C. § 2255 (ECF No. 1608) is DENIED.

20  
21 \_\_\_\_\_  
<sup>1</sup> 28 U.S.C. § 2253(c)(1)(B); Fed. R. App. P. 22(b)(1); 9th Cir. R. 22–1(a).

22 <sup>2</sup> *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000) (quotation omitted).

23 <sup>3</sup> *Hayward v. Marshall*, 603 F.3d 546, 553 (9th Cir. 2010) (en banc).

1 IT IS FURTHER ORDERED that defendant Jermaine Smith's request for a certificate of  
2 appealability is DENIED.

3 IT IS FURTHER ORDERED that the Clerk of Court is directed to enter a separate civil  
4 judgment denying defendant Jermaine Smith's § 2255 motion. The Clerk also shall file this  
5 order and the civil judgment in this case and in the related civil case number 2:18-cv-1487-APG.

6 DATED this 19th day of November, 2018.

7  
8 

9 ANDREW P. GORDON  
10 UNITED STATES DISTRICT JUDGE  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23